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March 29, 2011

EX PARTE

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245; *A National Broadband Plan for our Future*, GN Docket No. 09-51

Dear Ms. Dortch:

On March 29, 2011, John Seiver of Davis Wright Tremaine, LLP (DWT), on behalf of the State Cable Associations and Operators, met with Christine Kurth, Policy Director & Wireline Counsel to Commissioner McDowell, to discuss the Commission's Order and Further Notice of Proposed Rulemaking in WC Docket No. 07-245 ("Pole Order and FNPRM").

At the meeting, the State Cable Associations and Operators expressed strong support for the proposal in the FNPRM to promote broadband deployment by ensuring that pole attachment rates for all attachers are as low and close to uniform as possible. The State Cable Associations and Operators also asked, with respect to the *Pole Order*, that pole replacement be a required technique for make-ready, and also require that any denial of a replacement for insufficient capacity be allowed on a non-discriminatory basis only.

This request is the subject of a pending petition for reconsideration filed by the State Associations and Operators[1] and a recent ex parte letter[2] that was provided to Ms. Kurth during

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[1] *See* Petition for Reconsideration or Clarification of Alabama Cable Telecommunications Association, *et al.*, WC Docket No. 07-245, GN Docket No. 09-51, Sept. 2, 2010 (seeking review of pole change-out conclusions in *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 25 FCC Rcd. 11864 (2010) ("*Pole Order*")); Reply to Oppositions to Petition for Reconsideration of Alabama Cable Telecommunications Association, *et al.*, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 12, 2010. CTIA and Time Warner Cable supported the Petition. Comments of Time Warner Cable Inc. Regarding Petitions for Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 1, 2010, at § II; Comments of CTIA – the Wireless Association, WC Docket No. 07-245, GN Docket No. 09-51, Nov. 1, 2010, at 6-9.

the meeting (also attached hereto). I explained that pole replacements have been a routine part of pole ownership and pole make-ready for decades. When utilities (or joint owners) need additional height, and the pole location can accommodate it, they replace existing poles with taller poles. When a joint user or attacher asks for a change-out, the party requesting the change-out pays for the new pole and reimburses the utility and other attachers to move to the new pole. Under the express terms of Section 224(f)(2) a utility may only refuse a changeout (i.e., deny access claiming "insufficient capacity") on a non-discriminatory basis. For such purposes, "nondiscriminatory" is defined in the *Local Competition Order*[3] and requires an entity to apply the same terms and conditions it "imposes on third parties as well as itself," *id.* at 15612 (in § IV.G), and which can be avoided only where "it [is] technically infeasible" to provide "equal-in-quality" treatment. *Id.* at 15658-59 (in § V.G). This requirement for non-discrimination in *denials* of access was not reversed in *Southern Company*, or by any other court [4] and neither were the terms quoted above defining non-discrimination for purposes of Section 224. [5]

A changeout requirement would also advance the country's broadband policies. In seeking to "revis[e] … pole attachment rules to lower the costs of telecommunications, cable, and broadband deployment and to promote competition, as recommended in the National Broadband Plan," the *Pole Order* underscored that "communications providers have a statutory right to use space- and cost-saving techniques … consistent with pole owners' use of those techniques."[6] Without a requirement that changeouts may only be refused on a non-discriminatory basis as described above, pole owners could thwart broadband deployment by using discriminatory denials to assess unjust and unreasonable charges for make-ready.

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[2] Letter from John D. Seiver to Ms. Marlene Dortch, dated March 16, 2011, submitted in Dockets 07-245 and 09-51.

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16073 & n.2833 (1996) ("*Local Competition Order*") (citing to §§ IV.G & V.G in same), *on recon.*, 14 FCC Rcd. 18049 (1999) ("*Local Competition Recon. Order*").

[4] *See Southern Co. v. FCC*, 293 F.3d 1339, 1346-47 (11th Cir. 2002) (citing and quoting Commissioner Powell's dissent). In this connection, Commissioner Powell said that "the better reading is that … the electric utility is not mandated to expand capacity … under the non-discrimination principle drawn from section 224(f)(1)" but rather "must only ensure … denials of such requests are … non-discriminatory[.]" 14 FCC Rcd. at 18099. In other words, given how the *Local Competition* orders define "non-discriminatory," this meant that, in cases where a utility, in fact, makes changeouts for itself or some third-parties, it may not deny them to others, even under Commissioner Powell's dissent and, thus, *Southern Company*.

[5] Moreover, the Eleventh Circuit rejected any notion that a pole owning utility had the unilateral right to determine whether to deny access, finding such a delegation "is clearly not what Congress intended when it passed the Act." *Southern Co.*, 293 F.3d at 1347-48 (rejecting "argu[ment] that the language [in § 224(f)(2)] permitting utilities to deny access on the basis of 'insufficient capacity' specifically entrusts [ ] utilities with the power to determine when capacity is insufficient")

[6] *Pole Order* ¶ 1 (invoking *Omnibus Broadband Initiative*, Federal Communications Commission, "Connecting America: The National Broadband Plan," at 109 (2010) ("*National Broadband Plan*")) and ¶ 8.

Respectfully yours,

John D. Seiver
Counsel for State Cable Associations and Cable Operators

Attachment

cc: Christine Kurth